

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of)

Policies and Rules Concerning)
Children's Television Programming)

MM Docket No. 93-48

Revision of Programming Policies)
for Television Broadcast Stations)

RECEIVED

To: The Commission

MAY - 7 1993

**COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Connecticut Broadcasters
Association
The Illinois Broadcasters
Association
The Iowa Broadcasting Association
The Michigan Association of
Broadcasters
The Minnesota Broadcasters
Association
The Missouri Broadcasters
Association
The Nebraska Broadcasters
Association
The New Hampshire Association of
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The Oklahoma Association of
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The Tennessee Association of
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The Washington State Association
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SUMMARY

The Named State Broadcasters Associations participating in these Comments are pleased that the Commission is addressing the important area of children's programming. Broadcasters have been working to comply with the goals set forth in the Children's Television Act of 1990 (the "CTA" or "Act") but, admittedly, there has been confusion as to the types and amounts of programming that will satisfy the Commission.

The Act and the rules promulgated by the Commission in 1991 establish a basic framework that provides flexibility to broadcasters and places reliance on the reasonable judgment of broadcasters to ascertain and address the needs of their respective communities. This framework should not be altered.

The Commission should not undertake any changes without studying the television marketplace and the availability of children's programming. Locally-originated children's programming is very costly to produce and it would be impossible for all stations to air such programming on a weekly basis. Many stations are undertaking to produce local programming, but it is being designed to air in short-segments, as specials, or on less than a weekly basis. There is additional programming being developed by networks and independent producers but it is still in the pipeline.

Marketplace considerations also dictate that the Commission continue to provide broadcasters with the flexibility to rely on standard-length and short-segment programming as well as specials and general audience programming. Any narrowing of the

definition of children's programming would create even greater difficulties in obtaining programming and would stifle the creativity that is necessary to attract a child audience.

The Associations submit that staff processing guidelines setting quantitative minimum amounts of children's programming are contrary to the legislative intent underpinning the Act and antithetical to the goal of increasing children's programming. Clarification as to the kinds of programming that will meet the objectives of the Act should be set forth in a Policy Statement. The broad discretion of broadcasters to program in the best interests of the children in their communities should be reaffirmed.

The Associations submit that any Policy Statement issued by the Commission must set realistic guidelines. Any guidelines should permit different mixes of programming and, if minimums are imposed, the suggested amounts should be premised on quarterly rather than weekly time periods. All children's programming that is aired at hours other than midnight to 6:00 a.m. should be credited and special credit should be given to locally produced programming.

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**COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS**

The Connecticut Broadcasters Association, the Illinois Broadcasters Association, the Iowa Broadcasters Association, the Michigan Association of Broadcasters, the Minnesota Broadcasters Association, the Missouri Broadcasters Association, the Nebraska Broadcasters Association, the New Hampshire Association of Broadcasters, the Oklahoma Association of Broadcasters, the Tennessee Association of Broadcasters, the Washington State Association of Broadcasters, the West Virginia Broadcasters Association and the Wisconsin Broadcasters Association (collectively, the "Associations"), by their attorneys, hereby submit their Comments in response to the Commission's Notice of Inquiry, MM Docket No. 93-48, FCC 93-123, released March 2, 1993 (the "Notice").

I. INTRODUCTION

1. Various State Broadcaster Associations previously filed Comments and Reply Comments in the Commission's initial

rulemaking proceedings (MM Docket No. 90-570 and MM Docket No. 83-670) concerning the implementation of the Children's Television Act of 1990 (the "CTA" or the "Act").^{1/} Those comments endorsed the pragmatic regulatory system which was set forth in the Commission's Notice of Proposed Rule Making and which was ultimately adopted by the Commission.^{2/} That program carried out the requirements of the Act while respecting, as much as possible, the programming discretion of broadcasters.

2. The Commission has initiated this Notice proceeding to seek comment on possible revisions of its rules and policies "to more clearly identify the levels and types of programming necessary in the long term to adequately serve the educational and informational needs of children."^{3/} In the Notice, the Commission expresses its view that the level of performance it has observed in a one year period in which license renewal applicants have been subject to CTA requirements, has not been sufficient under the Act's objectives. The Notice first expresses the belief that, to comply with the CTA, broadcasters should place their primary reliance on standard-length programming that is specifically designed to serve the educational and informational needs of children and only

^{1/} Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b, 394.

^{2/} Report and Order In the Matter of Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (released April 12, 1991), Erratum, 6 FCC Rcd 3535 (1991), recon. granted in part, 6 FCC Rcd 5093 (released August 26, 1991).

^{3/} Notice, para. 1.

secondarily rely on short-segment programming. Second, the Commission believes that qualifying "core" children's programming should be primarily educational and informational in design, with entertainment only as a secondary goal. Finally, the Commission seeks comment on whether it should adopt staff processing guidelines specifying an amount and type of children's programming that would permit staff grant of a license renewal application.

3. The Associations urge the Commission to exercise restraint in this area. At the outset, the Associations do not believe that a radical departure from the governing principles set forth in the CTA and the Commission's Report and Order implementing the CTA is either warranted or appropriate. Moreover, the Commission must take into account certain marketplace realities before adopting any changes. Any modifications in policy that are adopted by the Commission should be in the form of a Policy Statement rather than processing guidelines. The Policy Statement should permit broadcasters to rely on both standard-length and short-segment programming to meet their obligations under the CTA. The FCC should refrain from narrowly defining "core" children's programming. Also, it should establish quarterly rather than weekly guidelines so as to permit broadcasters the broadest flexibility to rely on specials and locally produced programs that cannot be produced on a weekly basis.

4. It is obvious that the staff of the Commission's Video Services Branch are working diligently to ensure that the spirit

of the Act is carried out. However, the Commission should continue to afford broadcasters discretion to select programming of interest to the children in their communities and the flexibility to air that programming at times when children can reasonably be expected to be in the audience.

**II. THE GUIDING PRINCIPLES SET FORTH IN THE
CHILDREN'S TELEVISION ACT AND THE
COMMISSION'S REPORT AND ORDER REMAIN
SOUND AND SHOULD BE REAFFIRMED**

5. The legislative history underlying the CTA reflects a belief that a broadcaster's obligation as a public fiduciary includes a responsibility to render public service to children. At license renewal time, the Act requires that television licensees must be able to demonstrate that they have rendered public service to this unique audience. According to the House Report on the legislation, "the programming [aired by television licensees] must also educate or inform the child, as well as entertain. . . . Of course, entertainment programming including that not specifically designed for children, can also contribute in this respect." H. Rep. No. 101-385, p. 11. The Report emphasizes that the provision in the Act requiring broadcasters to serve children "is narrowly and appropriately tailored to accomplish this substantial interest. It does not exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited." *Id.* at p. 12. The section-by-section analysis contained in the House Report also reflects the

Committee's belief "that a broad range of programming will meet the standard of service to the child audience required by this Section [Section 4]." Moreover, the Committee notes that "general purpose programming can have an informative and educational impact. . . and thus can be relied upon by the broadcaster as contributing to meeting its obligation in this important area." Id. at p. 17.

6. The policies set forth in the Commission's April 1991 Report and Order are consistent with the legislative history.

The Commission states:

The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of 'specifically designed' programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station.

6 FCC Rcd at 2115.

The Report and Order advised broadcasters that short-segment programming, including vignettes and PSAs, could qualify as specifically designed educational and informational programming for children because it is "well suited to children's short attention spans and can often be locally produced. . ." Id. Broadcasters were further advised that qualifying programming need not be locally produced and need not be regularly scheduled; that qualifying programming need not be live action as opposed to

animation; and that general audience programming could contribute to serving children's needs under the Act. In its August 26, 1991 Memorandum Opinion and Order granting reconsideration in part, the Commission clarified that short-segment programming alone would not satisfy the Act's requirements but added that it would permit broadcasters to rely on short-segment material to contribute to fulfilling the programming requirement. 6 FCC Rcd at 5100. The Commission announced that it would continue to defer to the "reasonable programming judgments of licensees in this field," 6 FCC Rcd at 5099, citing the remarks of Sen. Inouye at 136 Cong. Rec. S 10121 (July 19, 1990).

7. The Associations believe that Congress and the Commission adopted a reasonable approach toward the

implementation of the CMA. Now, after reviewing a modest number

programming other than "The Smurfs" is unlikely to be credited. There have been indications that applications that contain educational and informational programming in the 6-7 a.m. time slot will not be granted in the future.

9. Broadcasters cannot comply with standards of which they are unaware. Neither the Act nor the Commission's prior pronouncements provided broadcasters with any warning that the Commission would be processing television license renewals in a far stricter fashion than publicly announced. The Associations urge the Commission to understand that broadcasters want to fulfill the objectives of the Act. The guiding principles set forth in the Act and the Commission's orders are sound. If the Commission desires to provide further guidance to broadcasters, it should do so by means of a Policy Statement. License renewal applications should not be deferred on the basis of unannounced new and stricter standards.

**III. THE COMMISSION SHOULD NOT MAKE ANY CHANGES
WITHOUT EVALUATING THE NATURE OF THE
TELEVISION MARKETPLACE**

10. The Associations believe that Congress intended that during the renewal review program the Commission would look broadly at the efforts of a broadcaster to be responsive to the needs of its community, taking into consideration the uniqueness of each broadcaster and each community. For example, a UHF television station in a small market may not be able to produce locally-originated children's programming because of financial constraints or may not be able to air two hours a week of

standard-length educational and informational children's programming. But it may nevertheless be able to demonstrate its compliance with the Act in other respects. On the other hand, the Notice suggests the adoption of very specific standards which would apparently be applied across the board to all stations. The Commission must take into account the fact that television markets vary substantially and that some markets have a number of public television stations serving the needs of the area's children.

11. The availability of children's programming must also be addressed. Because of cost considerations, not every television station can produce a locally-originated children's television program, and very few stations have the resources to produce a 30-minute long children's program that airs on a weekly basis. The networks and independent program producers are working on developing additional children's programming but such programming is not available in sufficient quantities at the present time so that all television stations in a market could obtain two hours per week. Indeed, stations have been involved in bidding wars over children's programming. Thus, the Associations urge the Commission not to impose any policies or requirements which cannot reasonably be met in the short term. The marketplace needs time to permit the development of additional programming. It is also important that the Commission not make changes in mid-stream without providing broadcasters with adequate time in which to respond.

**IV. THE COMMISSION SHOULD AFFORD DISCRETION TO
BROADCASTERS TO RELY ON BOTH STANDARD-
LENGTH AND SHORT-SEGMENT PROGRAMMING**

12. The marketplace forces described above reinforce the need to permit broadcasters to rely on both standard-length and short-segment programming as well as general audience programming. The legislative history behind the CTA reflects that Congress intended that broadcasters could rely on a broad variety of programming formats to meet their responsibilities. There is no reason why the Commission should now require that broadcasters must rely primarily on standard-length programming. Indeed, in view of the fact that there is not enough standard-length children's programming available to enable all broadcasters in a given market to fulfill the objectives of the Act, such a requirement would place broadcasters in substantial jeopardy. Moreover, a requirement such as that proposed could dissuade broadcasters from producing local short-segment children's programming. The Commission should reaffirm the principles previously established which provide broadcasters with broad flexibility to address the requirements of the CTA.

**V. THE COMMISSION SHOULD NOT NARROW THE DEFINITION
OF CHILDREN'S PROGRAMMING**

13. The April 1991 Report and Order states that "programming that furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs, can contribute to satisfying the licensee's obligation to serve the educational and informational

needs of children." 6 FCC Rcd at 2114. In the Notice of Inquiry, the Commission states that "it may be appropriate to specify that the primary objective of qualifying 'core' children's programming should be educational and informational, with entertainment as a secondary goal." There is no justification in the Notice of Inquiry for what amounts to a substantial shift in emphasis.

14. The Associations urge the Commission to retain the previously announced definitional framework and to rely on the good faith reasonable judgment of broadcasters in defining educational and informational programming. There is a definite risk that the proposed change would involve the Commission in qualitative judgments as to what is truly educational in violation of the First Amendment.

15. In accordance with the legislative intent, broadcasters should be given the discretion to determine what will best meet the needs of children in their communities. An emphasis on programming that is strictly "educational and informational" could result in a plethora of dull instructional programming that receives little viewer attention. However, if the Commission wishes to address the kind of programming it is looking for, that could be accomplished through the issuance of a Policy Statement.

**VI. QUANTITATIVE PROCESSING GUIDELINES ARE
INAPPROPRIATE - THE COMMISSION SHOULD
ISSUE A POLICY STATEMENT PROVIDING
FURTHER CLARIFICATION OF ITS POLICIES**

16. The Notice also seeks comment on whether the Commission should adopt staff processing guidelines specifying an amount and

type of children's programming that would permit staff grant of a license renewal application meeting the guideline. According to the Notice, the guideline could be one hour per week or one hour during the week and one hour during the weekend of standard-length, informational and educational programming.

17. The Associations believe that processing guidelines are not appropriate. Indeed, the legislative history of the Children's Television Act reveals that a quantification requirement was never contemplated. In connection with the section of the Act requiring the FCC to consider whether a licensee has served the educational and informational needs of children in its overall programming, the legislative history states:

The Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review pursuant to this Section or any section of this legislation.

H. Rep. No. 101-385, p.17. Nothing could be more clear than this statement.

18. Quantitative rule minimums or processing guidelines are ill-advised for other reasons as well. They run the risk of raising substantial First Amendment concerns. In fact, the Notice asks how such a standard would be affected by the amount, scheduling and quality of the material aired (Notice, para. 9; emphasis added). The Associations have this concern: whether built into the Commission's rules or established as processing

guidelines, quantitative minimums, although intended as "floors" for adequate performance, more often than not become "ceilings" for performance -- clearly a result not contemplated by Congress.

19. If the Commission wishes to provide clarification to broadcasters, it should do so by means of a Policy Statement. This would reduce uncertainty and foster compliance by broadcasters. Any guidelines set forth in a Policy Statement must be realistic. There is a special need for flexibility in enforcement if the Commission intends to announce strict guidelines. During the transitional phase, any quantitative minimums should be modest over the first several years and increase slowly. As noted previously, there is a need to develop more children's programming in the pipeline.

20. The Commission should also impose any quantitative minimums flexibly. There should be no minimums per weekday or weekend. Rather, any minimums should be spread over a period of

should reaffirm that broadcasters need not target individual subgroups of children age 16 and below.

22. All children's programming that is run at "non-graveyard" hours (i.e., other than between 12 midnight and 6:00 a.m.) should be credited toward meeting a broadcaster's obligation. While the staff has indicated a desire that children's programming not be aired between 6:00 a.m. and 7:00 a.m., during the week this is the only time when children can watch programing prior to leaving for school and on weekends, many children rise early. In addition, network affiliation agreements limit the scope of time available to broadcasters, and the prevalence of the use of the VCR renders the time periods less significant.

23. Finally, the Associations recommend that the Commission relax any quantitative minimums where stations do air locally produced programming. The production of locally produced children's programming requires a substantial expenditure of money and staff resources and thus deserves special credit.

CONCLUSION

Accordingly, for the reasons set forth above, the Associations request that the Commission give careful consideration to television marketplace realities before establishing any new requirements. While some clarification would be helpful to broadcasters in the form of a Policy Statement, the Associations do not support quantitative minimums

top a narrow definition of children's programming mbo

CERTIFICATE OF SERVICE

I, SYBIL R. BRIGGS, do hereby certify that I have this 7th day of May, 1993, mailed by first class United States mail, postage prepaid, copies of the foregoing "**COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS**" to the following:

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